



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 25, 1996

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR96-1010

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39824.

The City of Austin (the "city") received two requests for information relating to the proposal submitted to the city by CSW Communications, Inc. ("CSW") in response to the city's "Request for Strategic Partners for Telecommunications Infrastructure." You have submitted to this office a copy of CSW's proposal and several notes and memoranda prepared by city employees in the course of their review of the proposals that the city received. You claim that the proposal and portions of these memoranda are excepted from public disclosure under sections 552.101 and 552.110 of the Government Code.

Pursuant to section 552.305, we notified CSW of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. CSW responded by claiming that the requested information is excepted from public disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code.¹

¹Section 552.101 excepts from public disclosure information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Neither the city nor CSW has referred us to any law that makes the requested information confidential under section 552.101. Therefore, section 552.101 does not except the information from public disclosure.

CSW claims that "because CSW's negotiations with the City of Austin are ongoing, the requested documents are exempt from disclosure under section 552.104, which protects information pertinent to the competitive bidding process." Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). However, section 552.104 does not protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Thus, we need not address CSW's claim that the requested information is excepted from public disclosure under section 552.104.²

CSW also claims that the notes and memoranda prepared by city employees are protected from public disclosure by section 552.111. However, the city has not chosen to claim section 552.111 with respect to these documents. Section 552.111 does not protect the interests of private parties, and a governmental body may in its discretion release information protected by section 552.111. See Open Records Decision No. 470 (1987). As the city has not raised section 552.111, the city has waived any such claim. Therefore, we need not address this exception.

Section 552.110 excepts from disclosure a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

The city claims:

Information of this kind would not be readily available to the City without the cooperation and assistance of companies who are willing to provide information to the City. Obviously, businesses would be less willing to share information with the City if their proprietary and property rights are jeopardized. Accordingly, the disclosure of the information will impair the City's ability to obtain necessary information in the future.

²We note that the city has not claimed that the information at issue is excepted from public disclosure under section 552.104.

CSW claims:

If a respondent to a request for proposals believed that the proprietary information it provides might be revealed to those who would be competing against it for current and future projects, it might be chilled and inhibited from providing all of the detailed information sought by the governmental body or it might not bid at all.

We do not believe that the city's ability to obtain similar information in the future will be impaired by release of the information at issue, because it is unlikely that companies will stop competing for government contracts if certain information involved in those competitions is disclosed. See *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4 (D.D.C. 1981). In other words, the benefits associated with submission of this particular type of information make it unlikely that the city's ability to obtain future submissions will be impaired. However, we must address CSW's claim that releasing any of the requested information will cause CSW substantial competitive harm.

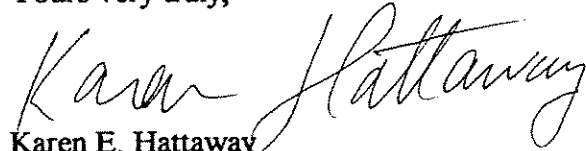
"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted). CSW claims that *all* information contained in the proposal and *all* factual observations made by city employees in the notes and memoranda are commercial or financial information. We disagree. A general claim that an exception applies to entire documents when the exception clearly does not apply to all information in the documents does not comport with the procedural requirements of the Open Records Act. Open Records Decision No. 419 (1984) at 3. CSW has not successfully demonstrated that section 552.110 applies to all of the requested information. Therefore, we have marked the information that appears on its face to be commercial or financial information, which, if released, would harm CSW's competitive interests. The city must withhold this information from public disclosure under the commercial or financial information prong of section 552.110.³ The city must release the remainder of the information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

³The city and CSW also claim that the proposal and portions of the notes and memoranda are trade secrets protected under section 552.110. In this case the trade secret prong of section 552.110 does not protect any of the information that we have concluded is not protected under the commercial or financial information prong of section 552.110.

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 39824

Enclosures: Marked documents

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